IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC94564
	)	
SANTONIO L. MCCOY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 19
THE HONORABLE JIMMIE M. EDWARDS, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal involves a challenge to the validity of the unlawful possession of a firearm statute, § 571.070.1(1), RSMo (Supp.2010), and therein involves an issue reserved for the exclusive jurisdiction of this Court under Article V, section 3 of the Missouri Constitution.

Prior to, during, and after trial, appellant objected to, and moved to dismiss, the charge against him asserting that the above statute was unconstitutional under Article I, section 23 of the Missouri Constitution. The trial court overruled his objections and, following a jury trial, appellant was found guilty. The trial court sentenced him, as a persistent felony offender, to seven years in the Missouri Department of Corrections.

Before briefs were filed in the Court of Appeals, this case was transferred to this Court on the motion of appellant, invoking this Court's exclusive appellate jurisdiction.

STATEMENT OF FACTS

This appeal presents a challenge to the constitutionality of § 571.071, RSMo (Supp.2010), Missouri's current felon-in-possession-of-a-firearm statute.[1]

In the early morning hours of June 23, 2012, two police officers on patrol in the Walnut Park neighborhood of St. Louis heard the sound of seven or eight gunshots a few blocks away from their location (Tr. 199-200, 258). Without activating the patrol car's sirens, they drove through several streets and toward the direction of the shots (Tr. 201-202, 291). Along the way, they heard a second round of shots and received dispatch reports of suspicious people, and a suspicious vehicle, on nearby Lalite Avenue (Tr. 201 275, 288-289).

The officers turned onto Lalite, a long avenue that dips down in the middle and comes back up (Tr. 219, 222-223, 276). As the officers were about midway down the avenue, they saw four black men up toward the end of the block (Tr. 222-223, 260-261). Two of the four immediately left the area before the officers could make out a description (Tr. 222-224, 260). The other two remained for another moment (Tr. 202-204, 299-300). As the officers got closer they saw that

[1] All statutory references are to RSMo 2000 unless otherwise indicated. Appellant will cite to the record as follows: "(L.F.)" for the legal file; (Tr.)" for the transcript; "(Supp. L.F.)" for the supplemental legal file; and, "(Appx.)" for the appendix.

one was holding an AK-47 rifle, and the other a MAC-11 pistol (Tr. 202, 261-263).[2]

The man with the AK-47 saw the officers and ran through a vacant lot, discarded the AK-47 on the ground, and was not later found (Tr. 203, 206, 226-227). The other man, holding the MAC-11, later identified as Appellant Santonio McCoy, saw the officers, turned, and started to run up an embankment in a yard (Tr. 204-205, 262-263). He slipped on the dew on the grass, and fell (Tr. 204, 225, 228). He then turned and tossed the MAC-11 pistol in the yard (Tr. 205-206, 229-230).

Mr. McCoy turned to the officers and said, "Hey, they went that way, there were just shooting out here" (Tr. 205-206, 264). The officers ordered Mr. McCoy off the embankment, handcuffed him, and placed him in the back of the patrol car (Tr. 231, 265). They later learned that he had several prior felony convictions (*See* Tr. 251, 253, 324; *see also* L.F. 12-13).

In the yard, the officers recovered the AK-47, the MAC-11, as well as an ammunition clip, and bullets for the MAC-11 (Tr. 207, 265-273, 279-280; State's

[2] The AK-47 was described as a "very big gun" that "looked like a rifle" with a curved, or "banana," magazine-clip for bullets (Tr. 261-262). The MAC-11 was described as a "long framed pistol" with a "long magazine" (Tr. 263).

Exhibit Nos. 1A, 1B, 1C, and 14).[3] A third gun, a nine-millimeter pistol, was also found on the ground nearby (Tr. 207, 280; State's Exhibit No. 15).

At the end of the block, past the next intersection, officers saw that a red Pontiac had crashed into the stairwell of a house (Tr. 208, 268-269, 281; State's Exhibit No. 17). That car, and other cars nearby, had been riddled with bullets (*See* Tr. 280-285; State's Exhibit Nos. 18-23). No one else was apprehended that day (*See e.g.*, Tr. 299-300).

The State of Missouri charged Mr. McCoy with unlawful use/felon in possession of a firearm in violation of § 571.070, RSMo (Supp.2010) (L.F. 12-13). As his listed prior felony offense, the state's information asserted that Mr. McCoy had previously been convicted of the felony of resisting, or interfering, with an arrest for a felony[4] on April 5, 2006 (L.F. 12). In addition, however, the information also indicated six other felonies for Mr. McCoy - each from eighteen years before in 1994: two separate first-degree tampering offenses (*see* § 569.080, RSMo), two separate felony stealing offenses (*see* § 570.030, RSMo), burglary in

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[3] The MAC-11 was checked in the computer database (*See* Tr. 328). The officers could not determine to whom the gun was registered (Tr. 328-329). It was not reported as having been stolen (Tr. 328-329).

[4] *See* § 575.150.5(1), RSMo. Also, as a part of the same case, in a separate count, the information asserted that Mr. McCoy previously pled guilty to unlawful use of a weapon (*See* L.F. 13).

the second degree (*see* § 569.170, RSMo), and either a misdemeanor or felony stealing offense (*see* § 570.030, RSMo) (L.F. 13).[5]

Prior to Mr. McCoy's December 2013 trial, the defense filed a motion, in April 2013 (and again through a nearly identical motion in September 2013) to dismiss the charge "with prejudice as § 571.070 violates the Missouri Constitution as applied" (L.F. 35-44; Supp. L.F. 1-10). In the motion, the defense asserted, *inter alia*, that § 571.070 (Supp.2010) violated Article I, section 23 of the Missouri Constitution "in that it is an absolute ban on Mr. McCoy's right to possess a firearm solely because he is a convicted felon. . ." (L.F. 40; Supp. L.F. 6). Addressing the previous version of Article I, section 23 of the Missouri Constitution[6] - before it was subsequently amended in August 2014 (as set out

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[5] Mr. McCoy was charged with the post-2008 version of § 571.070, RSMo., which does not distinguish between the types of prior felony crimes. A previous version of that statute specifically addressed only those who had previously been convicted of a "dangerous felony, as defined in section 556.061, RSMo," which included offenses such as forcible rape, kidnapping, and assault of a law enforcement officer. §571.070, RSMo 2000. None of the offenses listed in the information in this case would have qualified as "dangerous felony" under § 556.061, RSMo, and the previous version of § 571.070, RSMo (*See* L.F. 12-13).

[6] Before its 2014 amendment, the previous version provided: "That the right of every citizen to keep and bear arms in defense of his home, person and property,

below) - the motion asserted that § 571.070's flat ban on possessing firearms for all persons convicted of all felonies was not a "reasonable time, place or manner restriction allowed under the police power of the State." (L.F. 40-42; Supp. L.F. 6).

Prior to the start of trial, the defense again objected based on the unconstitutionality of § 571.070, RSMo (Supp.2010) (*See* Tr. 6-7). The trial court overruled the objection, and the case proceeded to trial (Tr. 7-416). At trial, in addition to the officers' testimony, the State presented evidence from 911 calls made at the time, which substantiated the officers' claims about having seen Mr. McCoy with the gun in his hand (*See* Tr. 341-343; State's Exhibit No. 3).

The defense presented the testimony of two of Mr. McCoy's friends, who were together with him at a house on Lalite Avenue (Tr. 350-351, 374-375). They testified that they noticed that someone was trying to break into, or vandalize, their friend's red Pontiac (Tr. 352-356, 377). Another friend went to move the Pontiac and, when he was backing the car out, shots rang out from across the street (Tr. 352-356, 377-379). Their friend crashed the car (*See* Tr. 355-356, 377-378). Each defense witness testified that Mr. McCoy was not in possession of a gun that morning (Tr. 358-359, 380).

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or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons." Article I, section 23 of the Missouri Constitution (1945).

Prior to the close of the case, the State presented certified copies of Mr. McCoy's convictions for each of the felonies listed in the information (Tr. 393-396). At the conclusion of the evidence, the jury found Mr. McCoy guilty, as charged, of unlawful use of a firearm (Tr. 416-417; L.F. 58, 63).

On February 4, 2014, the trial court denied Mr. McCoy's timely filed motion for a new trial, which included an assignment of error that § 571.070, RSMo (Supp.2010), violated Article I, section 23 of the Missouri Constitution (Tr. 422; L.F. 67). That same day, the Honorable Jimmie M. Edwards sentenced Mr. McCoy to seven years in the Missouri Department of Corrections (Tr. 428; L.F. 72-74).

On February 10, 2014, Mr. McCoy timely filed a notice of appeal (L.F. 76-79). On August 5, 2014 – while this case was pending - Article I, section 23 of the Missouri Constitution was amended, *inter alia*, to require that "any restriction" on the right to bear arms be subjected to "strict scrutiny." *See* Mo. Const., Art. I, section 23 (as amended 2014).

This appeal follows. Santonio McCoy states the above facts, and will adduce other facts, as necessary, in the argument portion of his brief.

POINT RELIED ON

The trial court erred by overruling appellant's motion to dismiss the felon-in-possession-of-a-firearm charge against him, because § 571.070, RSMo is unconstitutional and violates of Article I, section 23 of the Missouri Constitution (as amended 2014), in that § 571.070, RSMo does not pass "strict scrutiny" review and is not narrowly tailored to achieve any compelling interest of the state. Alternatively, § 571.070, RSMo is unconstitutional as applied to appellant in that – though convicted of previous felonies – he is not a "violent felon" and has never been "adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity."

In re Care and Treatment of Norton, 123 S.W.3d 170 (Mo. banc 2003);

Sable Commun. of California, Inc. v. F.C.C., 492 U.S. 115 (1989);

Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006);

Mo. Const., Art. I § 23 (2014); and,

§ 571.070, RSMo (Supp.2010).

ARGUMENT

The trial court erred by overruling appellant's motion to dismiss the felon-in-possession-of-a-firearm charge against him, because § 571.070, RSMo is unconstitutional and violates of Article I, section 23 of the Missouri Constitution (as amended 2014), in that § 571.070, RSMo does not pass "strict scrutiny" review and is not narrowly tailored to achieve any compelling interest of the state. Alternatively, § 571.070, RSMo is unconstitutional as applied to appellant in that – though convicted of previous felonies – he is not a "violent felon" and has never been "adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity."

Preservation

Prior to Mr. McCoy's December 2013 trial, the defense filed a motion, in April 2013 (and again through a nearly identical motion in September 2013) to dismiss the charge "with prejudice as § 571.070 violates the Missouri Constitution as applied" (L.F. 35-44; Supp. L.F. 1-10). In the motion, the defense asserted that § 571.070 (Supp.2010) violated Article I, section 23 of the Missouri Constitution "in that it is an absolute ban on Mr. McCoy's right to possess a firearm solely because he is a convicted felon. . ." (L.F. 40; Supp. L.F. 6). The motion asserted that § 571.070's flat ban on possessing firearms for all persons convicted of all felonies was not a "reasonable time, place or manner restriction allowed under the police power of the State." (L.F. 40-42; Supp. L.F. 6).

Prior to the start of trial, the defense again objected to the unconstitutionality of § 571.070, RSMo (Supp.2010) (*See* Tr. 6-7). The trial court overruled the objection, and the case proceeded to trial (Tr. 7-416).

On February 4, 2014, the trial court denied Mr. McCoy's timely filed motion for a new trial, which included an assignment of error that § 571.070, RSMo (Supp.2010), violated Article I, section 23 of the Missouri Constitution. Mr. McCoy was thereafter sentenced. Appellant believes this issue is adequately preserved for appellate review.

Standard of Review

Constitutional challenges to a statute are reviewed *de novo. Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010) (citing *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008)). A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. *Id.* (citing *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006)).

Relevant Statutory and Constitutional Law

Section 571.070, RSMo (Cum. Supp. 2010).

1. A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and:

(1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony; or

(2) Such person is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.

2. Unlawful possession of a firearm is a class C felony.

3. The provisions of subdivision (1) of subsection 1 of this section shall not apply to the possession of an antique firearm.

Article I, § 23 of the Missouri Constitution (as amended 2014)

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

Argument

Through the recent amendment to the Missouri constitution, the right to bear arms in Missouri has been exalted to a level paralleled by few other rights – except, for example, free speech rights which are subject to content-based restrictions. Even other "fundamental rights," such as the right to privacy and most of the provisions of the Bill of Rights do not necessarily trigger "strict scrutiny" review.[7] Missouri's recent amendment, however, expressly provides for such constitutional review by its terms. "Strict scrutiny" – as this Court knows - does not just vaguely mean some additional, or heighted, scrutiny on restrictions to gun possession, but invokes a specific legal standard with precise and onerous requirements. *See e.g., Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992) (indicating that "strict scrutiny" "force[s] the court[] to peel away the

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[7] Adam Winkler, Fundamentally Wrong About Fundamental Rights, 23 Const. Comment. 227, 228-232 (2006) (explaining that "strict scrutiny . . . is actually applied quite rarely in fundamental rights cases[;]" and that "of the ten provisions of the Bill of Rights, the vast majority does not trigger strict scrutiny"); *see also Herndon v. Tuhey*, 857 S.W.2d 203, 208-09 (Mo. banc 1993). An example would be the U.S. Supreme Court, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), using an "unduly burdensome" standard, rather than the "strict scrutiny" standard, in addressing restrictions on one's fundamental liberty interest. *See Herndon*, 857 S.W.2d at 208-09.

protective presumption of constitutionality and adopt an attitude of active and critical analysis") (citations omitted). Whether Missouri voters completely knew and could foresee all the consequences of it or not[8], they made it very difficult for this Court to uphold any restriction on guns rights, except those which are very well-drafted. Missouri's current felon-in-possession statute, which was drafted before the new constitutional amendment, does not come close.

However reasonable-sounding a ban on a felons' right to possess a firearm may seem in the abstract, a consideration of Missouri's automatic, exception-less, and perpetual ban on all felons having previously committed any felony shows that it falls far short of passing the "strict scrutiny" standard. Because § 571.070, RSMo (Supp.2010) is unconstitutional, the trial court's judgment must be reversed, and Mr. McCoy discharged from his conviction for unlawful possession of a firearm.

New Amendment Applies to This Pending Case

Constitutional provisions, like statutory provisions, are to be considered as having a "prospective operation only" unless some other intent is evident. *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396, 398-99 (Mo. banc 1972) (quoting *State ex*

[8] Whether, *inter alia*, voters were given a fair and sufficient understanding of the amendment is currently before this Court in a different case. *See* D. SAMUEL DOTSON III AND REBECCA MORGAN v. MISSOURI SECRETARY OF STATE JASON KANDER, ET AL. (SC94482).

rel. Scott v. Dircks, 111 S.W. 1, 3 (Mo. banc 1908)). "Prospective" operation or application, however, by long-held and widely-accepted doctrine, generally contemplates cases, like this one, still pending on appeal. *See e.g.*, *Linkletter v. Walker*, 381 U.S. 618, 624-627 (1965) (citing *United States v. Schooner Peggy*, 5 U.S. 103, 105 (1801)); *see also Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

In *Schooner Peggy*, in April 1800, a U.S. navy ship, "Trumbull," acting under existing United States law "with instructions to take any armed French vessel" which shall be found within certain jurisdictional limits of the United States[,]" captured the French schooner "Peggy" a few miles off the coast of Port au Prince. 5 U.S. at 104. In a subsequent condemnation action, the proceeds from the French vessel were awarded to the United States' government according the then-existing law. *Id*. at 106-107. While the appeal from that case was still pending, the United States and France entered into a treaty, in July 1801, which provided that "[p]roperty captured, and not yet definitively condemned . . . shall be mutually restored." *Id*. at 107 (italics omitted). In holding that this subsequent treaty, or law, would apply to the case on appeal, the United States Supreme Court wrote:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . In such a case the court must decide according to existing

> laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Schooner Peggy, 5 U.S. at 105.

In *Linkletter*, thereafter, the Court remarked that "under our cases . . . a change in law will be given effect while a case is on direct review" 381 U.S. at 627 (citing *Schooner Peggy*, *supra*). In *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. banc 2003), this Court expressly approved of Missouri's continued use of the approach taken in *Linkletter*, and of the later-decided case of *Stovall v. Denno*, 388 U.S. 293, 297-301 (1967).[9] In cases decided after *Linkletter* and *Stovall*, it has been explained that application of new law to cases pending on direct appeal is appropriate because it comports with a court's duty to "to do justice to each litigant on the merits of his own case," and to "resolve all cases before [the Court] on direct review in light of our best understanding of governing constitutional principles." *United States v. Johnson*, 457 U.S. 537, 555 (1982) (quoting *Desist v. United States*, 394 U.S. 244, 259 (1969), and *Mackey v. United States*, 401 U.S. 667, 669 (1971), respectively).

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[9] The issue in *Linkletter* and *Stovall* was not directly the application of new law to cases on direct appeal, but rather was one step further removed in that they concerned application of new law to cases already past direct appeal and on collateral review.

Even more directly, in *Griffith v. Kentucky*, in overruling a previous limited exception, the U.S. Supreme Court unequivocally held "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. 314, 328 (1987).[10] Again, this Court in *Whitfield*, *supra*, followed the reasoning of *Griffith* – and, in fact, went on to provide more than the "floor" rule of *Griffith* would require. *Whitfield*, 107 S.W.3d at 265, 268.

In a different case before this court, on the retroactivity of the U.S. Supreme Court's holding in *Miller v. Alabama*[11], the application of that newly announced law was, without dispute, applied to cases pending on direct appeal when the decision was issued. *See State v. Hart*, 404 S.W.3d 232, 235 fn. 3 (Mo. banc 2013); *State v. Nathan*, 404 S.W.3d 253, 270 fn. 9 (Mo. banc 2013)

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[10] It was on the basis of *Griffith v. Kentucky*, that the Louisiana Supreme Court – in a nearly identical case to the present case – determined that a later adopted constitutional amendment to that state's " right to bear arms" applied to cases "on direct review or not yet final." *State v. Draughter*, 130 So. 3d 855, 864 (La. 2013). It is also on the basis of *Griffith* that the State of Missouri – in a similar case currently before this Court – has urged this Court to apply the new amendment to this issue. *See State v. Merritt* (SC94096), State's Brief at 8-9, 19-21.

[11] 132 S. Ct. 2455 (2012).

Perhaps in another case, this Court will be called upon to decide whether Missouri's new constitutional amendment applies "retroactively" to cases already final, and on collateral review; however, that is not this case. Because Mr. McCoy's case is pending on direct appeal, Article I, section 23 as amended in August 2014 should apply to his case.

Under Strict Scrutiny Standard, Statute is Not Narrowly Tailored

In contrast to the ordinary standard of review that is to be applied when a party is challenging a statute (*i.e.*, that the one attacking the constitutionality of a statue carries the burden, and that the court presumes the constitutionality of the statute in question) once "strict scrutiny" is applied, the burden shifts to the State. *See e.g., Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992). To survive a strict scrutiny challenge, the state must show that Missouri's absolute, exception-less, and lifetime ban on the possession of firearms by those previously convicted of any felony is "narrowly tailored," or is the "least restrictive means," to further a compelling interest of the state. *See e.g., Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006) (citations omitted); *State ex rel. Coker-Garcia v. Blunt*, 849 S.W.2d 81, 85 (Mo. App. W.D. 1993); *Sable Commun. of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). It is the latter that the state cannot do.

At the outset, appellant will concede that the state has a compelling interest in protecting the public from crime. *See In re Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. banc 2003); *see also* Mo. Const., Art. I, § 2. However, the state does not have a compelling interest in banning all felons – simply because

they are felons - from possessing firearms, as a continued form of punishment, for example, or for some other reason not connected to public safety.[12] The issue in this case becomes how well-tailored § 571.070, RSMo is to achieve the state's interest of protecting the public. *See e.g.*, *Sable Commun. of California*, 492 U.S. at 126 (stating, "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends").

Section 571.070's simple and very wide distinction between those who have committed a misdemeanor and those who have committed any felony, without any other factors or considerations, cannot stand up under critical analysis. To distinguish a person who has stolen a $501 item from one who has stolen a $490 item, and to allow the latter to possess a firearm for her protection, but not the former seems plainly arbitrary. *See* § 570.030, RSMo. Some felonies, in fact, are simply the commission of a misdemeanor more than once. *See e.g.*, §

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[12] If the state had a compelling interest in banning all felons from possessing firearms simply due to their status as felons, then appellant would be forced to concede that this statute accomplishes that goal as no other statute could. However, the state can have no interest, much less a compelling interest, in leaving felons unprotected in their homes, or on their persons. The ban also cannot be justified as a continued form of punishment, since the felon has paid his debt. *See e.g.*, *In re Care & Treatment of Norton*, 123 S.W.3d 170, 177 (Mo. banc 2003).

302.321.2, RSMo; driving while revoked (three offenses in ten years is a class D felony); § 578.012.2, RSMo; animal abuse (second offense is a class D felony); § 565.074.3, RSMo; domestic assault in the third degree (third offense is a class D felony).[13]

Other felonies such as criminal non-support (§ 568.040.5, RSMo), writing bad checks (§570.120.4(1),(2), RSMo), tampering with a computer (§569.095.2, RSMo), or other purely financial fraud crimes (§ 407.020.3, RSMo, § 407.405, RSMo (pyramid schemes)), for example, cannot from a common sense viewpoint have any significant connection to one's future gun-related dangerousness. The simple felon-misdemeanor distinction, instead, paints with a broad brush and is over-inclusive by banning people that need not be banned to protect the public. It is a case of "burn[ing] the house to roast the pig." *Sable Commun. of California*, 492 U.S. at 131 (1989) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *see also State v. Bolder*, 635 S.W.2d 673, 692-93 (Mo. banc 1982) (where dissenting judge points out that, had strict scrutiny standard been used, statute which provides for aggravating circumstance - leading to death penalty - for one in lawful custody when murder is committed would be overinclusive because "[i]t does not differentiate between those who have nothing more to lose for a killing in prison unless they receive the death penalty and those who are not in that class . . .

[13] Beginning in 2017, these offenses will be class "E" felonies. *See* 2014 S.B. 491.

[and] . . . lumps everyone in prison into the same category"); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 428-29 (2000) (holding means chosen by state are "are crudely tailored because they are massively overinclusive" and "clumsily further the governmental interests that they allegedly serve").

Furthermore, even assuming *arguendo* that the state could present substantial evidence of a real connection between those who have committed "any felony" and that person's future gun-related dangerousness, the fact that Missouri's felon-in-possession-statute provides for no exceptions is evidence of it not being narrowly-tailored.[14] Missouri's statute is also absolute, has no procedures to test whether the person banned actually presents a danger, provides for no judicial review, and gives no real opportunity – outside of a governor's pardon[15] - for one to ever regain his or her right to possess a firearm.

In re Norton, this Court considered whether the state's different treatment of "sexually violent predators ("SVP)" (versus those adjudicated a danger to

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[14] The federal ban contained in 18 U.S.C. § 922(g) provides exceptions for those convicted of certain financial crimes related "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" or to those convicted of an offense "classified . . . as a misdemeanor and punishable by a term of imprisonment of two years or less" 18 U.S.C. § 921(a)(20)(A)(B). *See* (Appx. A6, A10).

[15] *See* § 217.800, RSMo.

themselves or others, or those acquitted on the basis of mental disease or defect) by placing them in a secure facility, was narrowly tailored to achieve the state's interest in protecting the public. 123 S.W.3d 170, 174 (Mo. banc 2003) as modified (Jan. 27, 2004). SVP offenders, as determined by the legislature, were considered "distinctively dangerous" and a "substantial probability" existed that they would commit future sexual crimes. *Id*. at 174. In considering whether different treatment by the state passed strict scrutiny, this Court first noted the many "procedural safeguards" afforded to SVP offenders, and held that only in light of those safeguards "and the multiple opportunities for court review and dismissal from secure confinement" did the different treatment withstand "strict scrutiny" review. *Id*. at 175-176.[16]

Therefore, even if all felony offenders, regardless of the offense, were considered to be on the same footing in terms of their future danger *vis-a-vis* firearms (the person who wrote a bad check twenty years ago the same as the person who is currently on probation for assault on a law enforcement officer) and they all could all be singled out as being "distinctively dangerous" like a "sexually

[16] Among the safeguards and rights afforded to SVP offenders were the right to a preliminary determination of SVP status by a judge; the right to contest an adverse ruling; the right to present evidence and cross-examine adverse witnesses; and, the right to require proof beyond a reasonable doubt that one is a "sexually violent predator." *In re Norton*, 123 S.W.3d at 174.

violent predator," Missouri's current felon-in-possession statute is not narrowly tailored in that it provides for no exceptions, has no procedural safeguards, no judicial review, and has no other provisions whereby one could regain his right to possess a firearm.[17]

If, on the other hand, the state were to argue that many misdemeanor offenders, such as repeat domestic violence offenders, were also dangerous, then § 571.070, RSMo would be subject to criticism that it is underinclusive. If by breaking the law a felon has shown that he is not to be trusted, then the same could be said for a misdemeanor offender. Without a consideration of the nature of the offense, a chronic speeder shows the same, or a clearer, willingness to break the law. The fact that § 571.070, RSMo may use some discrimination, and draw the line at a felony, does not show that it is narrowly tailored. That it would leave so many dangerous misdemeanor offenders unregulated just shows that it is misdirected. *See e.g.*, *Carey v. Brown*, 447 U.S. 455, 465 (1980) (indicating that "[t]he apparent overinclusiveness and underinclusiveness of the statute's restriction

[17] Many other states have procedures whereby a felon may, by petition to a court or other state authority, regain his right to possess a firearm. *See e.g.*, Conn. Gen. Stat. § 45a-100 (Appx. A11-A15); Respondent's brief in *Merritt v. State* (SC94096) (pending before this Court), gives a comprehensive overview of different state statutes on this issue, at pages 28-33.

would seem largely to undermine [] claim" that restrictions were justified by the interest advanced).

That it is possible for this statute to be more narrowly tailored is shown by Missouri's previous version of this statute. Under the pre-2008 version, only those convicted of a "dangerous felony" were permanently precluded from possessing a firearm. § 571.070, RSMo. 2000. Another example of a more narrowly tailored statute is Missouri's statue restricting a felon's right to vote, under § 115.133.2, RSMo. Missouri restricts a felon's right to vote during the period of his or her incarceration, as well as while on probation or parole, but limits its permanent, automatic, lifetime ban only to those previously convicted of a felony "connected with the right of suffrage." § 115.133.2(1),(2) and (3), RSMo.

There are numerous ways that Missouri's felon-in-possession-of-a- firearm-statute could be more narrowly drafted to achieve the goal of protecting Missouri's citizens. It could, for example, initially show some discrimination in who is permanently banned from possessing a firearm. It could provide a procedure whereby one previously convicted of a felony, or of a certain type of felony, could regain his right to possess a firearm. It could automatically restore the right after a set period of time. The ban could apply only while the person was on probation and parole, or not apply to possession of a firearm in one's home. Or it could require a finding, by a court or an administrative body, that the person to be banned actually did present a danger to society. Missouri's current statute makes

no attempt to narrowly tailor its means to achieve its ends. It does not pass "strict scrutiny" review.

Statute Is Unconstitutional As Applied to Mr. McCoy in that He Is Not a "Violent Felon"

In the alternative, § 571.070 (Supp.2010) is unconstitutional as applied to Mr. McCoy in that he is not a "violent felon," has not been convicted of a "violent felony," nor has he been "adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity" *See* Mo. Const., Art. I, section 23.

As its final clause, Article I, section 23 provides,

> Nothing in this section shall be construed to prevent the general assembly from enacting general laws which *limit the rights of convicted violent felons* or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

Mo. Const., Article I, section 23 (emphasis added).

Although section 23 provides for continued restrictions on gun possession for "violent felons," there is no definition of "violent felons," or a "violent felony" in the Missouri Statutes. However, a consideration of the nature, or designations, of appellant's prior felonies indicates that none of them were "violent" (*See* L.F. 12-13; Tr. 394-395; State's Exhibit No. 25-29). Mr. McCoy was previously convicted of two separate tampering offenses under § 569.080, RSMo, two stealing offenses under § 570.030, RSMo, burglary in the second degree under § 569.170, RSMo, and an additional stealing offense under § 570.030, RSMo.

Under § 556.061(8), RSMo, none of those offenses are considered to be a "dangerous felony." If not a "dangerous felony," they cannot be a "violent felony" since a dangerous felony must be considered to be more restrictive or exclusive than a "violent felony" (*i.e.*, some felonies, such as driving while intoxicated under § 577.023.2, RSMo may be dangerous, but not "violent").

Other parts of Missouri law support the conclusion that Mr. McCoy cannot be considered a "violent felon." *See* § 217.010, RSMo. Under § 217.010, RSMo, a "nonviolent offender" is described as "any offender who is convicted of a crime other than murder in the first or second degree, involuntary manslaughter, kidnapping, rape in the first degree, forcible rape, sodomy in the first degree, forcible sodomy, robbery in the first degree or assault in the first degree."

For all of the foregoing reasons, § 571.070 (Supp.2010) is facially unconstitutional under Article I, section 23 of the Missouri Constitution, or alternatively, unconstitutional as applied to appellant. The trial court's judgment must be reversed, and Mr. McCoy discharged from his conviction for unlawful use of a firearm.

CONCLUSION

WHEREFORE, based on his argument, Appellant, Santonio McCoy, requests this Court to reverse the judgment of the trial court, and discharge him from his conviction for unlawful use of a firearm.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 333, I hereby certify that on November 17, 2014 a true and correct copy of the foregoing brief was sent via the Efiling System to the Office of the Attorney General, using the email registered with the System. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and contains 5021 words, excluding the cover page, signature block, and certificates of service and of compliance.

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